

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

MALCOLM DARRELL KEYES,  
Defendant.

Civil Action  
No. 96-8239

Criminal No.  
93-22-2

MEMORANDUM

**Gawthrop, J.**

**August 11, 1997**

Malcolm Darrell Keyes, a prisoner in federal custody at F.C.I. Ray Brook, moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Mr. Keyes asserts that he did not "actively employ" a firearm during a crime of violence or drug trafficking under 18 U.S.C. § 924(c)(1), as interpreted by the Supreme Court in Bailey v. United States, --- U.S. ----, 116 S.Ct. 501 (1995). Mr. Keyes contends that I must apply Bailey retroactively and that his failure to raise the issue in the original proceeding or on direct appeal does not bar collateral review because he can show cause for his procedural default (i.e., the Court decided Bailey after his sentencing). See United States v. Tayman, 885 F. Supp. 832 (E.D. Va. 1995). Because Mr. Keyes participated in a crime of violence in which his confederate actively employed a weapon, I shall deny his motion.

28 U.S.C. § 2255 provides a post-conviction remedy for federal prisoners in the court that originally convicted them. See United States v. Hayman, 342 U.S. 205, 219 (1952). The statute provides relief for prisoners held in violation of the Constitution or laws of the United States, convicted by a court that lacked jurisdiction, sentenced for a period greater than that permitted by law, or held under a conviction otherwise susceptible to collateral attack. See 28 U.S.C. § 2255. A court must grant the movant a prompt hearing unless it appears conclusively from the files and the records that the prisoner has no entitlement to relief. See Sanders v. United States, 373 U.S. 1, 3-4 (1963); Fontaine v. United States, 411 U.S. 213, 215 (1973). "A person seeking to vacate his conviction bears the burden of proof upon each ground presented for relief." Walden v. United States, 418 F. Supp. 386, 388 (E.D. Pa. 1976).

On June 1, 1993, Mr. Keyes pleaded guilty to bank robbery, armed bank robbery, and using or carrying a firearm during a crime of violence. See 18 U.S.C. § 924(c). See also 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"). 18 U.S.C. § 924(c) applies to offenders who use or carry a firearm during a crime of violence. Mr. Keyes' guilty plea did not specify either the "use" or "carry" prong. However, either prong may establish guilt under 924(c).

In Bailey, the Court construed the "use" prong of

§ 924(c)(1) to require the government to prove the defendant's active employment of a firearm, not his mere possession of it, during a crime of violence or drug trafficking. See Bailey, --- U.S. at ----, 116 S.Ct. at 506. The Court did not directly address the "carry" prong of § 924(c), but consciously interpreted the use prong to "preserve[] a meaningful role for 'carries' as an alternative basis for a charge." Id., --- U.S. at ----, 116 S.Ct. at 507.

The Bailey Court never addressed the issue of accomplice liability for this crime. In United States v. Price, 76 F.3d 526, 529 (3d Cir. 1996), the Third Circuit held that aiding and abetting theory remains applicable to § 924(c)(1) after Bailey. A defendant who "probably knew in advance, and certainly knew at the time" that his co-conspirator pointed a gun during a bank robbery, and "continued to participate in the offense," had aided and abetted the firearm offense. Price, 76 F.3d at 530. In other words, one can incur accomplice liability for another's firearm offense if one knows in advance that his confederate intends to use a firearm in the crime in which he participates, or if one knows that his confederate uses a gun and continues to participate in the crime despite that knowledge.

Mr. Keyes continued to participate in a crime despite his knowledge of his confederate's use of a gun in that crime. I explained to Mr. Keyes the principle of accomplice liability with respect to the use of a firearm:

THE COURT: Using an carrying a firearm during a crime of violence. A crime of violence, there are various crimes of violence, one of which is robbery, one of which is armed robbery, using and carrying a firearm means taking something like a gun that goes bang and bullets that go out, and using it or carrying it.

In that regard, indeed with this entire incident as I understand this entire offense, there is a charge in the indictment, a Count for aiding and abetting. That is not technically a separate offense, but is the manner in which the Government is seeking to prove you guilty. That is to say, if you aid and abet somebody, in other words if you help somebody else to commit the robbery, if you walk in there with that person, and you cased the bank beforehand, and you walk in and for example, hand a note to the teller saying your money or your life, even though the other guy's got the gun, in the eyes of the law you are responsible for the gun even though your finger wasn't on the trigger.

Do you understand that sir?

MR. KEYES: Yes.

THE COURT: Having heard all these definitions, do you admit you are guilty of each and every one of those offenses?

MR. KEYES: Yes, sir.

THE COURT: Any questions in your mind?

MR. KEYES: No.

N.T. of June 1, 1993, at 12-13. Mr. Keyes admitted that he participated in the armed bank robbery in which his confederate, Paul Johnson, used a gun:

THE COURT: [D]id you go about helping Mr. Johnson?

MR. KEYES: Yes.

THE COURT: And you did that for the purpose of pulling off the bank robbery?

MR. KEYES: Yes.

Id. at 15. Mr. Keyes knew of Mr. Johnson's use of the handgun, and told the tellers to get down after the latter had drawn his weapon. See N.T. of Mar. 19, 1993, at 8, 11. Mr. Johnson actually fired his weapon at one of the tellers, wounding her. See N.T. of Jan. 31, 1995, at 112, and Feb. 3, 1995, at 29, in United States v. Johnson, No. 93 Cr. 22-1, (E.D. Pa. Feb. 3, 1995), aff'd, 103 F.3d 114 (3d Cir. 1996). Mr. Johnson undeniably actively employed a firearm during a crime of violence. See Bailey, --- U.S. at ----, 116 S.Ct. at 508 ("The active-employment understanding of 'use' certainly includes . . . [,] most obviously, firing or attempting to fire, a firearm"). Mr. Keyes's participation in the crime renders him liable for Mr. Johnson's firearms offense. Therefore, I must deny the motion.

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ORDER

AND NOW, this        day of August, 1997, for the reasons described in the accompanying memorandum, the defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 is DENIED.

BY THE COURT:

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Robert S. Gawthrop, III,        J.